

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AHMNED NASSER	:	SMALL CLAIMS DETERMINATION DTA NO. 819908
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
March 12, 2003.	:	

Petitioner, Ahmned Nasser, 1616 Bruckner Boulevard, Bronx, New York 10473, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended March 12, 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 5, 2005 at 2:45 P.M. Petitioner appeared by Samuel Ponce. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Paula Tunkel and Lawrence Hrazanek).

Since neither party reserved time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether petitioner was a person in possession of or had control of 35 cartons of unstamped or illegally stamped cigarettes and, as such, is liable for a penalty in the sum of \$4,500.00 imposed pursuant to Tax Law § 481(1)(b)(i).

FINDINGS OF FACT

1. On March 12, 2003, the Division of Taxation ("Division"), acting on information it had received from the Federal Bureau of Investigation, conducted a retail inspection of Leena Deli & Grocery Corporation ("the store") located at 1616 Bruckner Boulevard, Bronx, New York. During the course of its inspection, the Division found 35 cartons of cigarettes which contained counterfeit New York State tax stamps.

2. At the time that the Division commenced its inspection on March 12, 2003, there were only two sales clerks present at the store. When the clerks were questioned concerning who was in charge of the store they indicated that petitioner, Ahmned Nasser, was the manager of the store and the individual responsible for all of its day-to-day operations. The Division's investigators had one of the clerks call petitioner and he immediately came to the store.

3. Petitioner admitted that he worked at the store six days a week, eight hours a day; that he was the manager of the store responsible for all day-to-day operations; that he was the person who made all purchases, including the purchase of cigarette and tobacco products; and that he was the one who paid all of the bills. Based on its investigation, the Division concluded that petitioner was a person in possession and control of the 35 cartons of cigarettes which contained the counterfeit New York State tax stamps.

4. On October 14, 2003, the Division issued a Notice of Determination to petitioner asserting that he was liable for a civil penalty in the sum of \$4,500.00. The penalty was imposed pursuant to Tax Law § 481(1)(b)(i) at the maximum rate of \$150.00 per carton for 30 cartons of unstamped cigarettes. Although 35 cartons of unstamped cigarettes were found, Tax Law § 481(1)(b)(i) provides that the penalty of \$150.00 per carton be imposed for every carton in excess of five cartons of unstamped or unlawfully stamped cigarettes. Petitioner filed a timely petition contesting the Notice of Determination and this small claims proceeding ensued.

5. At the time of the inspection, there were approximately 235 cartons of cigarettes located within the store. Of this amount, 200 cartons were located in plain view, either at one of two service counters or in a storage area in a backroom. All of the 200 cartons of cigarettes in plain view contained the proper New York State tax stamps. The 35 cartons of counterfeit stamped cigarettes were concealed in a hidden location which the Division's investigators discovered when they moved a bench and found a metal plate which covered a dry well access for utilities. Located within an access panel in the dry well was a black bag which contained all 35 cartons of counterfeit stamped cigarettes.

6. It was obvious to the Division's investigators that the 35 cartons of cigarettes which had been hidden contained counterfeit tax stamps since the stamps affixed to each package contained five numbers. A proper New York State cigarette tax stamp contains either four numbers followed by a letter or a letter followed by four numbers. The Division's investigators also performed three additional tests, a black light test, a chemical test and a scratch test, and the 35 cartons of counterfeit stamped cigarettes failed all three tests.

7. Upon completion of the inspection, petitioner was arrested and charged with various criminal violations pursuant to Tax Law § 1814. On May 29, 2003, petitioner, in satisfaction of all charges, pled guilty in Bronx Criminal Court to a single misdemeanor pursuant to Tax Law § 1814(a)(1) for willfully attempting to evade or defeat the cigarette tax.

8. As the result of his guilty plea in Bronx Criminal Court, petitioner was ordered to pay a fine and make restitution of \$1,050.00. Petitioner's restitution payment of \$1,050.00 was forwarded to the Division and the Division applied the restitution payment to the Notice of Determination at issue in this proceeding. At the small claims hearing, the Division stipulated that the balance now due on its Notice of Determination dated October 14, 2003 is \$3,450.00 (\$4,500.00 - \$1,050.00).

SUMMARY OF PETITIONER'S POSITION

9. Petitioner maintains that the 35 cartons of counterfeit stamped cigarettes were purchased from a registered wholesale dealer of cigarettes and that he did not know that the cigarettes contained counterfeit tax stamps. Petitioner argues that the assessment of the penalty at the maximum rate of \$150.00 per carton is excessive and that it places an economic burden on him given his limited financial resources.

CONCLUSIONS OF LAW

____A. Tax Law § 481(1)(b)(i) provides, in pertinent part, that "the commissioner may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the

possession or under the control of any person. . . .” The penalty imposed by Tax Law § 481(1)(b)(i) can be waived in whole or in part by the commissioner in the commissioner’s discretion (Tax Law § 481[1][b][iii]).

B. In the instant matter, it is clear that petitioner was a person in possession or control of the 35 cartons of counterfeit stamped cigarettes found in the store and that the Division properly imposed a penalty against petitioner pursuant to Tax Law § 481(1)(b)(i). Petitioner’s assertion that he purchased the 35 cartons of counterfeit stamped cigarettes from a registered wholesale dealer of cigarettes is not supported by sales invoices or other credible evidence. Furthermore, petitioner’s statement that he did not know that the 35 cartons in question contained counterfeit tax stamps is belied by the evidence. Assuming, *arguendo*, that petitioner purchased the 35 cartons of counterfeit stamped cigarettes from a registered wholesale dealer and did not know that these cartons contained counterfeit tax stamps, then there would have been no need to separate these cigarettes from the 200 cartons of properly stamped cigarettes and conceal them. Petitioner went to great lengths to hide the counterfeit stamped cigarettes and such actions must weigh heavily against him. Also, petitioner’s guilty plea in Bronx Criminal Court to the misdemeanor violation of Tax Law § 1814(a)(1) does not help his position. For all of the above stated reasons, I see no basis to reduce the penalty from the amount as asserted due in the Notice of Determination dated October 14, 2003.

C. The petition of Ahmned Nasser is denied and the Notice of Determination dated October 14, 2003 is sustained.

DATED: Troy, New York
July 28, 2005

/s/ James Hoefer
PRESIDING OFFICER